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YAVAPAI COUNTY
SUPERIOR COURT

2010 OCT 22 AM 10:36 ✓

CLERK OF SUPERIOR COURT

BY: Ivy Rios

5 IN THE SUPERIOR COURT

6 STATE OF ARIZONA, COUNTY OF YAVAPAI

7 STATE OF ARIZONA,

V1300CR201080049

8 Plaintiff,

**MOTION FOR PROTECTIVE ORDER
RE: STATE'S NOTES FROM INTERVIEWS**

9 vs.

(The Honorable Warren Darrow)

10 JAMES ARTHUR RAY,

(Oral Argument Requested)

11 Defendant.

12
13 Comes now the State of Arizona, through undersigned counsel, and respectfully moves
14 this Court for a protective order protecting the State's notes from witness interviews from
15 disclosure. On September 20, 2010, this Court ordered the State to disclose the personal notes of
16 all the participants that attended the December 14, 2009 pre-indictment charging determination
17 meeting to the extent that the notes contained summaries of the medical examiners' oral
18 communications. The State has complied with this order.¹

19
20 On October 14, 2010, the State disclosed the names and curriculum vitae of two experts
21 it recently retained to testify at the trial in this matter. In its disclosure statement, the State
22 indicated the general subject of the experts' testimony and also informed Defendant that neither
23 expert had prepared a report in this case. In addition, the State provided notice of its intent to call
24 one of the experts, Mr. Rick Ross, at the evidentiary hearing scheduled to commence on
25

26 ¹ The State continues to believe it acted in good faith when it asserted work-product privilege
protected the notes from disclosure. The State complied with this Court's order without further
litigation in order to move the case forward and to focus on preparing the case for trial.

1 November 9, 2010.² On October 18, 2010, the State received a letter from Defendant requesting
2 “any and all statements from Mr. Ross, including without limitation his own notes and the
3 State’s notes memorializing Mr. Ross’ statements.” The State believes its notes from interviews
4 with witnesses in preparing for trial, including notes of consultations with potential experts, are
5 protected from disclosure under Rule 15.4(b), Ariz. R. Crim. P., and Rule 502(f)(2), Ariz. R.
6 Evid. This motion is supported by the following Memorandum of Points and Authorities.

8 MEMORANDUM OF POINTS AND AUTHORITIES

9 **A. The prosecutor’s notes from its witness interviews are work product and not**
10 **subject to disclosure.**

11 Rule 15.4(b), Ariz. R. Crim. P., exempts attorney work product from the disclosure
12 requirements of Rule 15 *et seq.* Specifically, the Rule provides:

13 (1) *Work Product.* Disclosure shall not be required of legal research or of
14 records, correspondence, reports or memoranda to the extent that they contain the
15 opinions, theories or conclusions of the prosecutor, members of the prosecutor's
16 legal or investigative staff or law enforcement officers, or of defense counsel or
defense counsel's legal or investigative staff.

17 Rule 502(f)(2), Ariz. R. Evid., defines “work-product protection” as “the protection that
18 applicable law provides for tangible material (or its intangible equivalent) ***prepared in***
19 ***anticipation of litigation or for trial.***” (emphasis added). Although the work-product doctrine is
20 most frequently asserted as a bar to discovery in civil litigation, its role in assuring the proper
21 functioning of the criminal justice system is even more vital.” *United States v. Nobles*, 422 U.S.
22 225, 238, 95 S.Ct. 2160, 2170 (1975).

23 Rule 15.1(b)(4), Ariz. R. Crim. P., requires the State to disclose the names and addresses
24 of experts who have personally examined a defendant or any evidence in the particular case,
25

26

² The State has since decided not to call Mr. Ross at the hearing. A Bench Memorandum relating to this decision is being filed with this Court.

1 together with the results of scientific tests, experiments or comparisons that have been
2 completed. The State agrees a defendant is entitled to review the information considered by an
3 expert in forming his opinion. At this point, the State has not provided to the expert witnesses
4 any materials relating to this case. The State also agrees a defendant is entitled full notice of the
5 "results of physical examinations and of scientific tests, experiments or comparisons" conducted
6 by an expert, even if the expert does not produce a written report." *State v. Roque*, 213 Ariz. 193,
7 ¶ 40, 141 P.3d 368, 383-384 (2006). To date, no physical examination, scientific tests,
8 experiments or comparisons" have been conducted by the States' experts. Notwithstanding this
9 fact, both witnesses are available to be interviewed by Defendant prior to trial and may be
10 questioned regarding their discussions with the State.

12 In *Upjohn v. United States*, 449 U.S. 383, 101 S.Ct. 677 (1981), the United States
13 Supreme Court made it clear that notes taken by attorneys are entitled to special protection. The
14 Court noted that some states have an absolute rule protecting attorneys' notes from disclosure -
15 "notes of conversations with witness 'are so much a product of the lawyer's thinking and so little
16 probative of the witness's actual words that they are absolutely protected from disclosure.'" *Id.* at
17 401, 101 S.Ct. at 689, citing from *In re Grand Jury Investigation*, 599 F. 2d 1224, 1231 CA3
18 1979.

20 The notes and memoranda sought by the Government here, however, are work
21 product based on oral statements. If they reveal communications, they are, in this
22 case, protected by the attorney-client privilege. To the extent they do not reveal
23 communications, **they reveal the attorneys' mental processes in evaluating the**
communications.

24 *Upjohn, supra*, 449 U.S. at 401, 101 S.Ct. at 689. (emphasis added).

25 While there may be circumstances where an attorney's notes are subject to disclosure,
26 this is not one of them. This is not a case where information has been withheld from the defense

1 as in *State v. Reid*, 114 Ariz. 16, 559 P.2d 136 (1976), nor is it a case where witnesses have made
2 statements that have contradicted their statements in disclosed reports as in *State v. Jessen*, 130
3 Ariz. 1, 3-4, 633 P.2d 410, 412-413 (1981). In both *Reid and Jessen*, information was available
4 in the State's notes that reflected statements by fact witnesses that either had not been disclosed
5 or that contradicted information that had been disclosed. Clearly, under these circumstances the
6 State had a disclosure obligation that could not be shielded by a claim of work-product privilege.
7

8 The State is prepared to make both experts available for interviews to enable the
9 Defendant to fully explore the scope of their testimony.

10 The purpose of Rule 15.1(a)(3) is "to give full notification of each side's case-in-
11 chief so as to avoid unnecessary delay and surprise at trial." The rule was
12 "designed to give the defendant an opportunity to check the validity of the
13 conclusions of an expert witness and to call such expert as his own witness or to
14 have the evidence examined by his own independent expert witness."

15 *State v. Roque*, 213 Ariz. 193, ¶ 32, 141 P.3d 368, 382 (2006). This purpose has been met and
16 will continue to be met by the disclosures made in this case and Defendant's pretrial interviews
17 of the State's witnesses. It is not further served through the disclosure of the personal notes of
18 the prosecutor from witness interviews.

19 **B. It is clear that Defendant now believes he is entitled to access to all of the State's**
20 **notes relating to its trial witnesses.**

21 During oral argument the State cautioned this Court that ordering the disclosure of the
22 State's notes could be the beginning of a slippery slope. With Defendant's most recent request it
23 is clear that Defendant now believes he should have access to all of the prosecutor's notes
24 relating to its trial witnesses.

25 On July 1, 2010, Defendant disclosed Dr. Ian Paul from the New Mexico Office of the
26 Medical Investigator as an expert witness. Defendant also indicated Dr. Paul had not prepared a

1 report. To date no further disclosure, including no resume or summary of the content of Dr.
2 Paul's testimony, has been received. The State has requested to interview Dr. Paul once his
3 review is complete.

4 In requesting the State's notes from any contact with State's expert Rick Ross, Defendant
5 stated:

6
7 Furthermore, while you indicated that you have no report from Mr. Ross at this
8 time, I am sure that the State is not calling Mr. Ross without first having some
9 conversation with Mr. Ross regarding his opinions, conclusions, and the scope of
10 his proffered testimony. Pursuant to Ariz. R. Crim. P. 15.1(e)(3) and *State v. Reid*,
11 114 Ariz. 16, 30 (1976), Mr. Ray requests any and all statements made by Mr.
12 Ross, including without limitations his own notes and the State's notes
13 memorializing Mr. Ross' statements.

14 It is assumed that Defendant had similar conversations with Dr. Paul when it made the
15 decision to retain him as a trial witness. Given this Court's interpretation of notes and
16 Defendant's argument, does the State now have a right to see the Defendant's notes that contain
17 a "statement" of this witness and Dr. Paul's notes "without limitations?" The Defendant's
18 disclosure obligations under Rule 5.2 *et seq.*, Ariz. R. Crim. P., mirror the language of the State's
19 disclosure obligations under Rule 15.1 *et seq.*, Ariz. R. Crim. P., and also require a defendant to
20 disclose all "statements" of his witnesses.

21 It is expected that once Dr. Paul reaches his conclusion, he will discuss it with
22 Defendant's counsel. Does the State get the defense attorneys' notes from this meeting to the
23 extent Dr. Paul's "statements" are included? When the State raised this question during oral
24 argument relating to the notes from the December 14, 2009 meeting, Defendant insisted it was a
25 "different" situation. The State does not see a difference. Moreover, if there was any valid
26 difference relating to the notes from the pre-indictment meeting, there is clearly no difference in
the instant request for notes.

1 Under criminal case disclosure procedures, the State receives a report (essentially a
2 "statement") from a defendant's expert, along with a summary of the materials he examined in
3 reaching whatever conclusion. If the expert does not provide a report, the State is provided
4 notice of the information reviewed by the expert in preparing to testify. The State is then
5 provided an opportunity to interview the defendant's expert to prepare for trial. This is the
6 normal disclosure practice in a criminal case and notes from the expert's discussions with the
7 defendant or his attorneys are not included.

9 It is now clear to the State that Defendant believes the State has an obligation to disclose
10 a witness's statements to the defense whenever they have a discussion with a witness prior to
11 trial. Typically notes are taken during pre-trial meetings to prepare both the prosecutor and the
12 witness for their testimony. It is assumed defense counsel engages in a similar practice. The
13 State has never been ordered to disclose these notes, nor does it ever receive the same from the
14 defense.

16 In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947), the United States Supreme
17 Court warned of the dangers of requiring an attorney to disclose a witness's oral statements,
18 whether in the form of the attorney's mental impressions or memoranda.

19 Under ordinary conditions, forcing an attorney to repeat or write out all that
20 witnesses have told him and to deliver the account to his adversary gives rise to
21 grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is
22 served by such production. The practice forces the attorney to testify as to what
23 he remembers or what he saw fit to write down regarding witnesses' remarks.
24 Such testimony could not qualify as evidence; and to use it for impeachment or
corroborative purposes would make the attorney much less an officer of the court
and much more an ordinary witness. The standards of the profession would
thereby suffer.

25 *Id.* at 512-513, 67 S.Ct. at 394. The Court also noted its denial of the production of this material
26 did not "mean that any material, non-privileged facts can be hidden from the petitioner in this

1 case." *Id.* To the contrary, the court found "production of written documents and statements
2 upon a proper showing and *direct interviews with the witnesses themselves* all serve to reveal
3 the facts [] to the fullest possible extent consistent with public policy." *Id.* (emphasis added) The
4 same is true in the instant case.

CONCLUSION

5
6 It has now become clear Defendant believes he is entitled to all of the State's notes from
7 its pre-trial contacts with witnesses. Unless the State's notes reflect statements by fact witnesses
8 otherwise not disclosed or that contradict previously disclosed information, such notes are
9 protected from disclosure as work product under Rule 15.4(b), Ariz. R. Crim. P., and Rule
10 502(f)(2), Ariz. R. Evid. Accordingly, the State requests this Court to issue an Order of
11 Protection relating to the disclosure of the prosecutors' notes from pre-trial interviews, including
12 the State's notes with regard to contacts with expert Rick Ross.
13
14

15 RESPECTFULLY submitted this 21 day of October, 2010.

16
17 By Sheila Sullivan Polk
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20 **COPIES** of the foregoing emailed this
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